# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 12, 2007 |
| v | No. 268150<br>St. Clair Circuit Court |
| TERRY LEE CEASOR,<br><br>Defendant-Appellant. | LC No. 05-000220-FH |

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree child abuse, MCL 750.136b(2). We affirm.

Defendant first argues that the trial court erred in qualifying Dr. Holly Gilmer-Hill as an expert witness regarding shaken baby syndrome (SBS). Because defendant did not object to the trial court qualifying Gilmer-Hill as an expert witness, this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). This Court will not reverse a conviction based on an unpreserved issue except for plain error that affected a defendant's substantial rights by resulting in the conviction of an actually innocent person or seriously affecting the integrity, fairness, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999). The admissibility of evidence is within the discretion of the trial court and will not be reversed unless the trial court abused its discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court's decision on a close evidentiary question generally cannot be an abuse of discretion." *People v Meshall*, 265 Mich App 616, 637; 696 NW2d 754 (2005). Interpretation of a court rule is a question of law that is reviewed de novo. *People v Walters*, 266 Mich App 341, 346; 700 NW2d 424 (2005).

Defendant argues that the trial court should not have qualified Gilmer-Hill as an expert on SBS because the theory is not generally accepted in the scientific community. Although defendant cites a few articles to support his position that the diagnosis of SBS is contested in the medical community, the referenced articles are not part of the lower court record and defendant has failed to move to amend the record for inclusion of the documents. As a consequence, we cannot consider the proffered information because it is not properly before us. See *People v Elston*, 462 Mich 751, 759-760; 614 NW2d 595 (2000).

In addition, defendant, citing to *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 469 (1993), contends that Gilmer-Hill did not qualify as an expert under MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under MRE 702, which has incorporated the *Daubert* requirements,[1] the proponent of expert witness testimony must establish that the testimony is reliable by showing that "the data underlying the expert's theories and the methodology by which the expert draws conclusions from the data [are] reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 789; 685 NW2d 391 (2004).

With respect to the requirement under MRE 702 that an expert's testimony must be "based on sufficient facts or data," Gilmer-Hill testified that she physically examined the victim, reviewed his CAT scan, consulted an ophthalmologist who confirmed the existence of retinal hemorrhaging, and spoke to his mother regarding the cause of the injury. In addressing the requirement that an expert's "testimony is the product of reliable principles and methods," when asked about the "research, technology, [and] different mechanisms" utilized to study SBS, Gilmer-Hill testified that she was familiar with "several" published studies that examined whether symptoms indicative of SBS could occur accidentally, emphasizing a study, which concluded that only abuse could account for the symptoms traditionally attributed to SBS. Gilbert-Hill offered unrefuted testimony regarding the existence of professional publications pertaining to the diagnosis of SBS in support of the reliability of the underlying methods and principles for her diagnosis. See *Daubert, supra*. Considering her testimony as a whole, Gilmer-Hill adequately demonstrated that the diagnosis of SBS was generally accepted within the medical community.

Defendant argues, however, that because some experts have disputed the SBS diagnosis, the diagnosis is unreliable. Defendant refers to facts that are not matters of record to dispute plaintiff's theory that SBS is a recognized or reliable diagnosis. Again we do not consider facts cited by defendant that are not part of the record. *Elston, supra*. Further, even if it was appropriate to consider these papers, nothing in MRE 702 or *Daubert* and its progeny suggest that expert testimony should not be admitted if an opponent shows that the theory relied upon is disputed by some experts in the scientific community. The proponent must establish reliability by a preponderance of the evidence, *id.* at 593 n 10, and, even assuming there is *some*

[1] See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004), and the staff comment to MRE 702.

*disagreement* regarding SBS, defendant has not shown an abuse of discretion. Similarly, defendant's argument that Gilmer-Hill's theories were unreliable because she disagreed with the studies cited by defense counsel during cross-examination goes to the weight of her testimony, not to its admissibility. *People v England*, 176 Mich App 334, 340; 438 NW2d 908 (1989).

Concerning the requirement under MRE 702 that "the witness has applied the principles and methods reliably to the facts of the case," Gilmer-Hill demonstrated, through her own direct professional experience with SBS and the data she had studied, see *Gilbert, supra*, that the victim's injuries were the result of child abuse, and that a child with the victim's symptoms would "become symptomatic right away." We further note that Gilmer-Hill testified that another indicator of SBS, in addition to the physical symptoms, is that the explanation of the injuries given by caregivers commonly changes. In this instance, defendant initially told police that the victim's mother was present when the alleged fall occurred but later admitted that she was not present and altered details of his recollection of events preceding the child's injury.

Gilmer-Hill's testimony assisted the jury in understanding the evidence and determining whether the injuries were accidental. The trial court did not abuse its discretion in finding that Gilmer-Hill possessed the necessary "knowledge, skill, experience, training, or education" to testify as an expert on SBS. Gilmer-Hill had six years of experience as a neurosurgeon; having attended medical school and completing a residency and fellowships. Gilmer-Hill was licensed in the field of pediatric neurosurgery and demonstrated extensive study of medical literature on SBS. These factors, combined with her direct observation in medical practice of victims of SBS and her previous qualification as an expert witness regarding SBS on numerous occasions supported the trial court's determination of her qualification as an expert witness. *People v Lewis*, 160 Mich App 20, 28; 408 NW2d 94 (1987).

Defendant's reliance on *Daubert* for the proposition that an expert witness must have personally published and conducted research is misplaced. Although publication and peer review of the *theory* proposed by an expert may be relevant to whether the theory is reliable, there is no requirement under *Daubert* or the Michigan Rules of Evidence that an expert must have personally published any materials on the subject matter in issue. See also *In re Noecker*, 472 Mich 1, 11; 691 NW2d 440 (2005) (rejecting an argument that an expert witness must have been "publish[ed], present[ed], or conduct[ed] peer review on the topic in the recent past" when the evidence showed that the proposed expert possessed the requisite education, training, and experience in the field at issue).

Defendant next argues that plaintiff did not comply with MRE 703, which requires that the facts or data upon which the expert relied must be in evidence, because nothing regarding SBS was admitted into evidence, and Gilmer-Hill did not cite the studies that she claimed supported the diagnosis of SBS. Defendant cites no authority for the proposition that the "facts or data," as those terms are used in MRE 703, refer to writings the expert may have studied to become an expert on a given subject, so we need not address defendant's argument in this regard. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Furthermore, cases addressing the meaning of "facts or data" within the context of MRE 702 and MRE 703 presume that the "facts or data" refer to the facts of the case that would support the expert's opinion, and do not include information or documentation pertaining to the expert's education on the topic.

Defendant also argues that defense counsel was constitutionally ineffective for failing to present an expert witness to rebut the prosecutor's SBS evidence or for failing to convince defendant of the need to hire an expert. Because defendant did not move for a *Ginther*[2] hearing, this Court's review is limited to errors apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Defendant asserts that because defense counsel mentioned articles in medical journals that questioned the prosecution's expert's understanding of SBS during cross-examination, defense counsel could have found an expert witness willing to testify on defendant's behalf. It cannot be said, based on the existing record, that an expert would have been willing to opine that, under the circumstances of this case and given the victim's symptoms, the victim could not have suffered his injuries as a result of being shaken or slammed or that his injuries could have been accidental. Thus, any conclusion that an expert could have successfully challenged Gilmer-Hill's diagnosis is entirely speculative.

Further, the record does not support defendant's contention that his counsel failed to contact or try to procure an expert to support defendant's theory. Specifically, the trial court granted defendant a stipulated adjournment to consult an expert witness, and defendant then received additional adjournments because his counsel had located an expert on SBS willing to review the evidence. Applying the presumption that counsel's decision to not call an expert witness was a matter of sound trial strategy, *Dixon, supra*, defendant cannot overcome the presumption that defense counsel declined to present an expert witness because any expert consulted was unwilling to support defendant's position that the injury was accidental or would not have presented favorable testimony after reviewing the evidence. The fact that SBS may be a disputed diagnosis does not mean that an expert would have found after reviewing the evidence that this victim's injuries resulted from an accident, nor does the existing record support such a conclusion.

Similarly, it cannot be said that defense counsel failed to explain to defendant the importance of hiring an expert. Notably, defendant suggests that defense counsel may have explained to defendant the need to hire an expert, but because no expert was hired, this Court should infer that defense counsel was ineffective because he failed to convince defendant of this need. Plaintiff cites no legal authority in support of his position. In general, "[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation and quotations omitted).

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant further argues that the evidence was insufficient to support his conviction. This Court reviews an insufficiency of evidence claim de novo to determine whether the evidence, when viewed in the light most favorable to the prosecution, would justify a rational trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

Defendant argues that the evidence fails to show, beyond a reasonable doubt, that defendant specifically intended to harm the victim. Defendant further contends that the idea that experts can determine intent from physical findings is "junk science." However, "intent generally may be inferred from the facts and circumstances of a case." *People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993). Under MCL 750.136b(2), "A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." The jury could have properly inferred that defendant knowingly or intentionally harmed the victim from the testimony of Gilmer-Hill, who opined that the injuries did not appear to be accidental and were caused by someone shaking the victim forcefully or slamming him onto a surface. Although Gilmer-Hill acknowledged that a person could suffer a subdural hematoma and not immediately show symptoms, she rejected suggestions that this might have occurred with this victim, stating, "with this injury, with subdural hemorrhage and bleeding within both eyes indicating severe injury, then the child becomes symptomatic right away, the child does not run around asymptomatic . . . . for several hours . . . ." In addition, the jury heard evidence from which it could have found that the victim had not been left alone with anyone but defendant when the injuries causing his symptoms were incurred.

Defendant next argues, "the expert's testimony is based purely on speculation and scientific evidence that is not conclusive." However, expert witnesses can offer opinions, MRE 703, and Gilmer-Hill was properly qualified to offer her opinion on causation. Far from her opinion being based purely on speculation, Gilmer-Hill testified she had examined the victim, considered his CAT scan, and that she had consulted an ophthalmologist. Considerations regarding the weight of the evidence are properly left to the jury. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Defendant next argues that the evidence was insufficient because defendant testified that the victim had been alone when he fell and that his mother testified that she had noticed a mark on the victim's head. However, there was evidence that both defendant and the mother lied about the alleged fall when they both claimed that the mother was in the home at the time, but later admitted that she was not present. Further, the health professionals who testified at trial all asserted that they physically examined the victim for external injuries and did not find, recall, or record any external injuries. Considerations of credibility and the weighing of the evidence are properly left to the jury. *Fletcher, supra*. Further, the prosecution is not required to rule out every arguable theory of innocence, but is only required to prove its theory beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Accordingly, considering the evidence in the light most favorable to the prosecutor, *Tombs, supra*, sufficient evidence was presented to support defendant's conviction.

Finally, defendant argues that the prosecutor committed prosecutorial misconduct when she stated during oral argument that Gilmer-Hill "was able to refute" all of the theories

mentioned during cross-examination to rebut the SBS theory. Because plaintiff did not object to the challenged statement below, this issue is not preserved. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). "[A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. In order to avoid forfeiture . . . , the defendant must demonstrate plain error that was outcome determinative." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted).

The prosecutor's remarks that Gilmer-Hill refuted all of the challenges to the SBS evidence did not amount to prosecutorial misconduct, or plain error, because the comment comprised a reasonable inference based on the evidence, specifically Gilmer-Hill's testimony about certain theories and studies. See *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003) ("A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence.")

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Donald S. Owens